

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

APRIL TERM, 1912.

No. 2405.

903

THE PHILIP CAREY COMPANY, A CORPORATION,
APPELLANT,

vs.

WILLIAM F. THYSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED MARCH 13, 1912.

PRINTED MARCH 27, 1912.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 2405.

THE PHILIP CAREY Co., a Corporation, Appellant,
vs.
WILLIAM F. THYSON.

a Supreme Court of the District of Columbia.

At Law. No. 52636.

WILLIAM F. THYSON, Plaintiff,
vs.
THE PHILIP CAREY COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed May 19, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52636.

WILLIAM F. THYSON, Plaintiff,
vs.
THE PHILIP CAREY COMPANY, a Corporation, Defendant.

The plaintiff sues the defendant for that on, to-wit, April 1st, 1909, the plaintiff was employed by the defendant as selling agent for the sale and distribution of the products of the said defendant corporation, to-wit, its paint and roofing material, at and for an agreed compensation to the plaintiff equivalent to 5% of the gross amount of all sales made by the defendant corporation in the City of Baltimore and the State of Maryland. That the plaintiff was to

have charge, supervision and control of said sales for the said State of Maryland and the City of Baltimore and was to receive the said salary compensation equal to 5% of all sales made by the defendant corporation in the said State and City during the term of plaintiff's employment; that plaintiff accepted the said employment upon the terms so offered and took charge of the said work and continued in charge of it continuously, giving his time thereto, from the said first day of April, 1909, to February 20th, 1910, when plaintiff resigned and gave up said work; that during said period of time, plaintiff devoted himself assiduously to the advancement of the business of the said corporation and largely increased its said business and there was sold in the territory of the plaintiff a total of paints and roofing material, amounting to Eighty Thousand Dollars (\$80,000) in the aggregate, upon which said sum plaintiff is entitled to the 5% commission as salary agreed upon, or a total of Four Thousand Dollars (\$4,000). That upon said amount, he has received from the defendant corporation a payment on account of past salary amounting to only Fifteen Hundred Dollars (\$1500.00), leaving due the sum of Twenty-five Hundred Dollars (\$2500), which the defendant has failed and refused to pay, though demand therefor has been repeatedly made.

And the plaintiff claims Twenty-five Hundred Dollars (\$2500.00) with interest thereon from the 20th day of February, 1910, besides cost.

2. For money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at *his* request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at *his* request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims \$2500.00, with interest from the 20th day of February, 1910, according to the particulars of demand hereto annexed.

McNEILL & McNEILL,
Attorneys for Plaintiff.

3

Bill of Particulars.

Filed June 7, 1910.

* * * * *

The defendant is indebted to the plaintiff for commissions on account of sales of roofing materials, paint, pitch, cement, nails, brushes, etc., as follows:—

From April 1st, 1909, to Feb. 20th, 1910, as follows:—

Amount of materials sold during said time.....	\$80,000.00
Commissions thereon at 5%.....	<u>\$4,000.00</u>

Paid on account of salary, as follows:—

April, 1909.....	\$125.00
May, 1909.....	125.00
June, 1909.....	125.00
July, 1909.....	125.00
August, 1909.....	150.00
Sept., 1909.....	150.00
Oct., 1909.....	150.00
Nov., 1909.....	150.00
Dec., 1909.....	150.00
Jan., 1910.....	150.00
Feb., 1910.....	100.00
Total	\$1,500.00
	<u>\$2,500.00</u>

Of the above items Roofing material sold amounting to \$70,000.00
 And paints and miscellaneous items 10,000.00

Making said total of..... \$80,000.00

upon which commissions were charged at 5%.

McNEILL & McNEILL,
Attorneys for Plaintiff.

4

Pleas.

Filed June 11, 1910.

* * * * *

For a plea to the first count of the plaintiff's declaration in the above entitled cause this defendant says it is not indebted as therein alleged.

And for a further plea to said first count of the plaintiff's declaration this defendant says it never promised as therein alleged.

And for a plea to the second count of the plaintiff's declaration in the above entitled cause this defendant says it never promised as therein alleged.

A. S. WORTHINGTON,
Attorney for Defendant.

Joinder of Issue.

Filed June 13, 1910.

* * * * *

The plaintiff joins issue with the defendant on its plea filed in the above entitled cause.

McNEILL & McNEILL,
Attorneys for the Plaintiff.

Amended Declaration.

Filed November 16, 1911.

* * * * *

The plaintiff sues the defendant for that on, to-wit, April 1st, 1909, the plaintiff was employed by the defendant, as selling agent for the sale and distribution of the products of the said defendant corporation, to-wit, its paint and roofing material, at and for an agreed compensation to the plaintiff equivalent to 5% of the gross amount of all sales made by the defendant corporation in the City of Baltimore, State of Maryland, and parts of the states of Virginia and West Virginia, included in what is known as the Baltimore territory of the Defendant Company. That the plaintiff was to have charge, supervision and control of said sales for the said territory and was to receive the said compensation equal to 5% of all sales made by the defendant corporation in the said territory during the term of plaintiff's employment; that plaintiff accepted the said employment upon the terms so offered and took charge of the said work and continued in charge of it continuously, giving his time, exclusively thereto, from the said first day of April, 1909, to February 20th, 1910, when plaintiff resigned and gave up said work; that during said period of time, plaintiff devoted himself assiduously to the advancement of the business of the said corporation and largely increased its said business and that there was sold in the territory of the plaintiff, and under his supervision and agency, a total of paints and roofing material, amounting to

6 Eighty Thousand Dollars (\$80,000.00) in the aggregate, upon which said sum plaintiff is entitled to the 5% commission as salary agreed upon, or a total of Four Thousand Dollars (\$4,000.00). That upon said amount, he has received from the defendant corporation a payment on account of past salary amounting to only Fifteen Hundred Dollars (\$1500) leaving due the sum of Twenty-five Hundred Dollars (\$2500.00), which the defendant has failed and refused to pay, though demand therefor has been repeatedly made.

And the plaintiff claims twenty-five hundred dollars (\$2500.00) with interest thereon from the 20th day of February, 1910, besides cost.

2. For money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at his request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims \$2500.00, with interest from the 20th day of February, 1910, according to the particulars of demand hereto annexed.

McNEILL & McNEILL,
Attorneys for Plaintiff.

7

Pleas to Amended Declaration.

Filed November 22, 1911.

* * * * *

For a plea to the first count of the plaintiff's amended declaration in the above entitled cause this defendant says it is not indebted as therein alleged.

And for further plea to said first count of the plaintiff's amended declaration this defendant says it never promised as therein alleged.

And for a plea to the second count of the plaintiff's amended declaration in the above entitled cause this defendant says it never promised as therein alleged.

A. S. WORTHINGTON,
Attorney for Defendant.

Memorandum.

November 24, 1911.—Verdict for Plaintiff for \$831.88 and interest from May 6, 1910.

8

Supreme Court of the District of Columbia.

FRIDAY, December 8, 1911.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * *

Now come here as well the plaintiff by his Attorneys Messrs. McNeill and McNeill, as the defendant by *his* attorneys Messrs. A. S. Worthington and Charles L. Frailey; whereupon, on hearing the defendant's motion for a new trial filed herein, it is considered that said motion be, and it is hereby overruled, and judgment on verdict ordered.

Therefore, it is considered that the plaintiff herein recover against the defendant herein the sum of Eight hundred and thirty-one and 88/100 dollars (\$831.88) with interest thereon from the 6th day of May, 1910, being the money payable by said defendant to the plaintiff, by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

The defendant by its Attorneys in open Court notes an appeal to the Court of Appeals of the District of Columbia, and, the penalty of the bond on said appeal to act as a Supersedeas is hereby fixed in the sum of one thousand dollars (\$1,000.), or, in lieu thereof a bond for costs in the sum of one hundred dollars (\$100.).

Assignment of Errors.

Filed December 19, 1911.

* * * * *

The defendant in this action, in connection with its appeal heretofore noted in open court on the 8th day of December, 1911, makes the following assignment of errors which it avers occurred upon the trial of said cause, to wit:

I. The court erred in its refusal to grant instruction No. 1 prayed by the defendant, which reads as follows:

"The jury are instructed to render a verdict for the defendant."

II. The court erred in its refusal to grant instruction No. 2 prayed by the defendant, which reads as follows:

"If the jury believe from the evidence that the plaintiff was employed on the 1st day of April, 1909, by defendant as a salesman in the roofing department of the defendant at an agreed salary of \$125.00 per month, and that such salary was to be gauged upon the basis of five per centum of the individual sales of the plaintiff; that thereafter, on or about the 1st day of May, 1909, the defendant was made manager of said roofing department of the defendant and as such received an agreed salary of \$125.00 per month, which
10 salary was increased by agreement between plaintiff and defendant to \$150.00 per month on or about the 1st day of September, 1909, and remained at said sum per month until the plaintiff left the employ of the defendant on or about the 20th day of February, 1910, and that the plaintiff received said salary up to said last mentioned date, then their verdict should be for the defendant."

III. The court erred in its refusal to grant instruction No. 4 prayed by the defendant, which reads as follows:

"If the jury believe from the evidence that the witness N. S. Kenney, while acting as manager of defendant's office in the City of Baltimore, State of Maryland, employed the plaintiff upon the terms that the plaintiff was to receive his compensation for his employment and services a fixed salary of \$125.00 a month and in addition thereto five per centum of the amount of all sales of roofing material made by defendant in the territory of Maryland and certain parts of Virginia and West Virginia in excess of thirty thousand dollars, and if they further believe from the evidence that the said Kenney at the time of the employment of the plaintiff as aforesaid had no authority to employ plaintiff upon the terms aforesaid but had
11 authority only to employ plaintiff in accordance with and upon the terms contained in the letters in evidence marked Exhibits "Thyson No. 1" and "Thyson No. 5," and the "application" in evidence, then they are instructed that the said employment of the plaintiff by the said Kenney upon the said terms of \$125.00 a month and five per centum of the amount of all sales of roofing material made by defendant in Maryland and parts of Vir-

ginia and West Virginia in excess of thirty thousand dollars did not bind the defendant, and their verdict should be for the defendant.

IV. The court erred in its refusal to grant instruction No. 5 prayed by the defendant, which reads as follows:

"The jury are instructed that they are not to consider in this case the second count of the declaration and the plaintiff cannot recover thereon."

V. The court erred in its refusal to grant instruction No. 6 prayed by the defendant, which reads as follows:

"If the jury find for the plaintiff, their verdict should be for an amount equal to 5 per centum of the difference between \$30,000 and \$37,312.02, that is 5 per centum of \$7,312.02."

VI. The court erred in using the following language in the charge to the jury:

12 "Was it understood and is it a fair result of the way the business was treated by the plaintiff and the company that what was sold in that territory was to be treated as his sales, whether he made it personally or whether he made the sale by helping the agent, or whether the sale was made by the agent under him, or was this contract abandoned and that he was to take whatever the company chose to give him? What was the situation?"

VII. The Court erred in using the following language in the charge to the jury:

"Now, if you are satisfied from the evidence in the case that the contract was that he was to receive a salary on the basis of 5 per cent of the sales, and if those sales, whether made by himself or his agents under him, were all to be treated as his sales, and that that contract was fairly within the authority conferred by these letters, and was the real understanding between the plaintiff and defendant company, then the question is how much he is entitled to * * *"

Wherefore, the defendant prays that the judgment of the Supreme Court be reversed.

CHARLES L. FRAILEY,
Att'y for Defendant.

13 *Memoranda.*

December 29, 1911.—Supersedeas bond approved and filed.

January 5, 1912.—Bill of Exceptions submitted.

January 26, 1912.—Time to file transcript of record extended, from day to day, to, and including, March 15th, 1912.

Supreme Court of the District of Columbia.

SATURDAY, *February 3, 1912.*

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * *

The Court having this day signed the bill of exceptions heretofore submitted herein, now orders the same of record as of the time of the noting thereof at the trial.

Bill of Exceptions.

Filed February 3, 1912.

* * * * *

Be it remembered that at the trial of the issues joined in the above entitled cause before the Honorable Wendell P. Stafford, an Associate Justice of the Supreme Court of the District of Columbia and a jury regularly empannelled and sworn to try the issues joined between the plaintiff and the said defendant, the plaintiff, to maintain the issues on his part joined, testified in his own behalf and gave evidence tending to show that he had a conversation in the city of Baltimore at the office of the defendant company with one N. S. Kenney, Manager of defendant's Baltimore branch, respecting his employment by said defendant and his compensation therefor, and was told by said Kenney that he, the plaintiff, was to be the manager of the whole roofing department of the defendant's branch in Baltimore and was to make individual sales of roofing materials and was to get credit on the entire gross sales made by his own efforts and also on the sales of three or four salesmen under him, the plaintiff; that the sales of the roofing department consisted of sales of roofing, paints, nails, brushes and roofing cement. The plaintiff then called upon the defendant to produce certain correspondence called for by notice — produce which the defendant by its counsel thereupon handed to the plaintiff's counsel and which was offered and read in evidence and which is in the words and figures as follows,

15 to wit:

“The Philip Carey Company,
Lockland, Station R.

Office of the Vice President.

CINCINNATI, OHIO, *March 27th*, 1909.

Mr. N. S. Kenney, Mgr. The Philip Carey Company, Baltimore, Md.

DEAR SIR: Your favor of the 23rd received with reference to dispensing with Mr. H. Z. Meginnis' services, and any action you take in this matter will be entirely satisfactory to us, as Mr. Meginnis' showing so far, is not satisfactory.

With reference to putting F. W. Thyson on the roll at \$125.00 per month, this is quite an increase in your selling expense when you take into consideration the fact that you have put Mr. Huggins on the roll at a good salary, and while we would like very much to have you secure the services of Mr. Tyson in view of the opinion you hold of him, we would suggest that you make an effort to secure his services for \$125.00 per month, with the understanding that we are to pay him in salary the equivalent of 5% on his sales, the \$125.00 per month simply representing a drawing account.

We have established a policy of paying all our salesmen in so far as possible, according to their results based upon 5% of their gross

16 sales. This is simply a figure used in figuring out what they are actually worth to us. Suggest you put this proposition up to Mr. Tyson and see what he thinks about it. If you can make connection with him you are at liberty to do so, and would thank you to let us know as to what date his services would start. Also send application in the regular way, and let us know on what date Mr. Meginnis' services will be terminated.

Very respectfully,
(Signed)

A. B. CRABBS,
Vice-President."

said letter being Exhibit Thyson No. 1.

"The Philip Carey Company,
434-38 N. Holliday St.,

BALTIMORE, MD., *March 30, 1909.*

(Date stamp as follows: Received
April 1, 1909, The Philip Carey Co.)

Mr. R. B. Crabbs, V. P. The Philip Carey Co., Lockland, O.

DEAR SIR: I note yours of the 27th regarding position of F. W. Thyson. I have decided to follow out your approval of Mr. Thyson at \$125.00 per month, pay to start first of April, giving him the entire State of Maryland as his territory.

I will dispense with Mr. Meginnis' services on Saturday of this week. He will be back from one of his trips at that time.

I enclose herewith application in regular way for Mr.
17 Thyson.

Very truly yours,

N. S. KENNEY."

said letter being Exhibit Thyson No. 2.

"The Philip Carey Company,
434-38 N. Holiday St.,

BALTIMORE, MD., *April 7, 1909.*

Mr. R. S. Crabbs, V. P. The Philip Carey Co., Lockland, O.

DEAR SIR: I beg to acknowledge receipt of your favor of the 5th regarding the services of Mr. Thyson at the rate of \$125.00 per month.

Inasmuch as I have made connections with him at that figure, I think it will be well to let the matter stand at the present time. I am building very great hopes on the efforts of this gentleman and you will find that his services will soon develop the fact that he is worth considerably more money to us. I will appreciate if you will let the \$125.00 arrangement stand as requested.

Very truly yours,
NSK/MP

N. S. KENNEY."

said letter being Exhibit Thyson No. 3.

"The Philip Carey Company,
Lockland, Station R.

Office of the Vice President.

CINCINNATI, O., *Sept. 28th, 1909.*

Mr. N. S. Kenney, Mgr. The Philip Carey Co., Baltimore, Md.

DEAR SIR: Your favors of the 13th and 22nd received upon my return to the Lockland office, and I note your recommendations with reference to increasing Mr. Thyson's salary, and since our records do not give us a line on his work, we take it for granted that you are thoroughly familiar with all he is doing and would not make the recommendation unless you felt he was fully entitled to the amount. It is on these grounds that we are approving same, and his name will appear on the pay-roll, starting as of Sept. 1st at \$150. per month.

We hope Mr. Thyson will keep up the good work and make you a most valuable man in the roofing department.

Very respectfully,
(Signed)

R. B. CRABBS,

said letter being Exhibit Thyson No. 4.

"The Philip Carey Company,
434-38 N. Holiday St.,

BALTIMORE, MD., *March 23, 1909.*

Mr. R. B. Crabbs, V. P. The Philip Carey Co., Lockland, O.

DEAR SIR: In looking over the record of Mr. H. Z. Meginnis, I find that his efforts have availed about the same kind of results as all previous salesmen we have had in the territory. I am thinking very strongly of dispensing with his services on the first of the month and I am able at the present time to secure one of the best men for our business that I have been able to meet so far.

While he is a high price man, yet I believe I can get him at much less salary than he is getting at the present time, because he is rather anxious to come with us, thinking that his ability as a salesman will secure for him a better future. He has about reached his limit in the business in which he is now associated and is willing to take a trial with us. I believe, however, I cannot get him for less than \$125.00 per month. By dispensing with Mr. Meginnis' services, this will make an increase in my expenses of \$60.00 per month if I should take him with us. He is thoroughly acquainted with all the architects and builders in the City and it is my intention to let him work in conjunction with these individuals and also to get after the f. o. b. business in the State of Maryland.

The Virginia situation is now thoroughly covered by Mr. Huggins and in order to perfect my intentions for the f. o. b. business in the entire territory, it will be necessary for me to have a good man for the State of Maryland. Therefore, I would ask that you give me your approval to secure the services of the man referred

to. His name is Frank W. Tyson, thirty years old, married, living in Baltimore. I have been personally acquainted with him for a number of years and perfectly aware of his ability. I am fully satisfied we can increase our business very greatly provided there is any prospective business in sight.

Please let me hear from you along these lines as quickly as possible because warm weather is near and we want to get going at once. It is important that you give this matter your immediate attention.

If you so approve, I will forward application blank as per our usual custom.

Very truly yours,
(Signed)

N. S. KENNEY."

said letter being Exhibit Thyson No. 5.

There was also produced and read in evidence a certain application referred to in Exhibit Thyson No. 2, which is in the words and figures following, to wit:

"The Philip Carey Company.

Application for Employment of Help.

BALTIMORE BRANCH, *March 30th, 1909.*

This form to be filled out in every case before filling a position or employing additional help aside from temporary labor, in any department, and both original and duplicate forwarded to Vice President at Home Office. Duplicate will be returned with approval or disapproval.

Position to be filled, SALESMAN.

Salary proposed, \$125.00 per month.

If position now occupied, by whom and what salary, No.

Name of applicant, Frank W. Tyson.

Age, 30 years.

Married or single, Married.

Nationality, American.

Religion,

Extent of education, High School and Eng. School.

Last Previous employment, and its length, Maryland Terra Cotta, 3 yrs.

Employments prior to last, and length of each, Perth Amboy Terra Cotta Co. 5 yrs. Maryland Terra Cotta Co. 3 yrs.

References, N. S. Kenney.

Remarks:

(Signed)

N. S. KENNEY.

Approved.

R. B. C., *Vice President.*"

The plaintiff further testified that he was made acquainted at the time he closed the arrangements with said Kenney with the contents of a letter from Mr. Crabbs referred to as Exhibit Thyson No.

1, that said Kenney figured out that the salary would be
22 \$125.00 a month or \$1,500 a year, representing \$30,000 of sales; that on all above that, plaintiff was to get 5%. Subsequent to the conversation with Kenney and to knowing about the contents of the aforementioned correspondence he took up active work as the sales manager of the Baltimore territory, which consisted of Baltimore, Maryland, and parts of Virginia and West Virginia. Plaintiff worked in Baltimore with one Burleigh, a salesman, and made it his business to go wherever he thought business was, and traveled over Maryland and parts of Virginia; that his commissions were alluded to in conversations with Kenney and nothing specific or definite was said until Kenney one day said, "Let's have this commission business out. I don't think Crabbs understands it," to which plaintiff replied, "I believe he does, he ought to at least. The correspondence will show it," to which Kenney replied, "Just let this go for a while" and put it off. Witness went to Ohio to the home office of the company in Lockland, a suburb of Cincinnati with said Kenney, but said nothing about commissions there to Mr. Crabbs, the Vice-President of the Company; that he and Kenney were not friendly after the return from Lockland, but were cool toward each other. Plaintiff constantly alluded to commissions after the return from Lockland in July and August—the plaintiff was employed in April—and Kenney said, "Wait, you will get everything you want a little later. You have made a good success and Crabbs thinks a deal of you, and sooner or later you will get just exactly what you are entitled to."

23 Referring to the application specifying plaintiff's salary at \$125.00 a month Kenney told witness he had authority to put him on under the conditions named.

On cross-examination plaintiff stated that when he was told by Kenney about getting 5% on all sales above \$30,000 a Mr. Roush was called in and the arrangement was repeated in Mr. Roush's presence. Mr. Roush was bookkeeper. That was in Mr. Kenney's private office. In the conversation between witness and Kenney concerning the correspondence in evidence what Kenney told witness was in the correspondence was the agreement that they had before Mr. Roush came in—he told me I was to receive \$125.00 a month beginning with April 1st. I don't recall anything else he told me was in those letters except that the \$125.00 was to be a drawing account.

Q. Did he tell you that the understanding that Mr. Crabbs had was that you were to be paid a salary equivalent to 5% on your sales? A. I don't think that he remarked that Mr. Crabbs had but he told me it was to be the equivalent of 5% on my sales representing \$30,000.

Q. 5% over that on your sales was to be added to the \$125.00? A. Was to be a commission, yes, sir.

Q. Now, I am right about that, and I? A. Yes, sir.

Q. You are clear about that? A. Yes, sir, as I have stated.
24 Plaintiff further testified that he remembered signing the application, and his attention being called to the fact that his

name was not on it, he then stated that he did not remember whether he had signed that one or not, there were so many of them—they had eight or ten, perhaps fifteen, salesmen going back and forth and that the one as to his own employment, being "Exhibit Thyson No. -2" he could not remember whether he had ever seen it or not.

Q. Now, as a matter of fact, Mr. Thyson, when Mr. Kenney and you were discussing this matter of your employment, were not you shown this application and agreed to it verbally? A. No, that came afterwards, Mr. Frailey.

Plaintiff further testified that Mr. Roush paid him his salary in person and that he, the plaintiff, signed and receipted therefor. Plaintiff thereupon identified receipts which he received for his salary, and they were received in evidence marked "Exhibit Cross-Ex. No. 1." The first receipt is in the words and figures following, to wit:

"4, 30, 1909. Received of the Philip Carey Company One Hundred and Twenty-five Dollars salary in full April, 1909. \$125.00."

The receipt for the May salary is in the words and figures following, to wit:

"6, 1, 1909. Received of the Philip Carey Company \$125.00 for May salary. \$125.00."

25 Said receipts for June, July and August salary are the same as the one for May salary. The receipt for September salary is in the words and figures following, to wit:

"10, 2, 1909. Received of the Philip Carey Company \$150.00, September salary."

The October, November and December, 1909, and January, 1910, receipts are the same as the September salary receipt. The last receipt for salary, dated March 1st, 1910, was in the words and figures following, to wit:

"3, 1, 1910. Received of the Philip Carey Company \$106.25 for 17 days' salary, February, 1910."

Said receipt contained the word "Thanks" written across the face thereof in the handwriting of the plaintiff.

That the receipt for September, 1909, for \$150.00 was so because the plaintiff's salary had been increased \$25.00 a month. Plaintiff further testified that after he left the employ of the company in February, 1909, he did not remember when he first made any demand on the company for the excess claimed in this suit or to whom he made it. Plaintiff further testified that he had the entree to the office files and records of the company in Baltimore and used the files whenever he wanted to, that they were not secret but were merely correspondence. Thereupon the following was asked the plaintiff:

Q. I wish you would tell us a little more in detail what
26 Mr. Kenney told you in his private office when he employed You. A. He told me that he would give me \$125.00 a month or \$1,500 a year, which represented \$30,000 on about what they had been doing, and all over \$30,000 in my department I was to get 5%.

Plaintiff further testified that with reference to the raise of his salary Mr. Kenney stated he had good news for plaintiff and handed

him the money and said the company was so pleased with what plaintiff was doing that they saw fit to give him an increase of \$25.00 a month, for which plaintiff thanked him and that was all that was said. He, the plaintiff, was not employed by the company six weeks or two months before being put in charge of the roofing department, but the day the plaintiff went with the defendant he got a typewriter and a stenographer and started off.

On re-direct examination plaintiff further testified that he could not remember the exact conversation with Mr. Kenney at the time of his employment but as near as he could remember Kenney said, "I can do certain things for you," and then named what he could do, and plaintiff surmised that Kenney got his instructions from his home office. That with reference to the receipt whereon he receipted for his salary in full, referring to the receipt for April salary, 1909, plaintiff testified, "I regarded that as my guarantee, \$125.00 a month representing \$30,000, and of course that did not include commissions."

27 Thereupon, on re-cross examination, the following questions were propounded to the witness and the following replies were made thereto by him:

Q. You say you had access to these monthly reports, and so on. Suppose at the end of any one month the volume of business done would be such that five per cent of that business would amount to a good deal more than \$125 then under your claim and the contract as you claim it, you would be entitled to that excess for the month, would you not? A. Just as stated there in the letter from Mr. Crabbs, yes, sir.

Q. Well, we don't read that letter the same, perhaps. But this is what I want to get at, that is what you understood to be the contract? A. All over and above \$30,000 worth of business that I had.

Q. I am speaking of any one month. A. That was not figured on a monthly basis, Mr. Frailey, at all. After I had done the \$30,000 worth of business, then I was to enjoy the commissions.

Q. And you were not to enjoy them until you did do \$30,000 worth? A. And there was no commission due at any particular period until after we jumped over the \$30,000. After that time I was to draw the commissions, besides my \$125, and if it went over for perhaps eight months or ten months and still kept within the \$30,000 I was not to get a commission, and could not expect it.

Q. It did not make any difference for any particular month? A. Not for any particular month.

28 Thereupon, to further maintain the issues on his part joined, the plaintiff called as a witness in his behalf L. J. BURLEIGH, who testified in substance that he was not employed by the defendant now but had been in 1909, 1910, and had been since October, 1906, and was there when plaintiff came with them. He worked mostly in Baltimore, was a salesman for the company and recognized the plaintiff as being the manager over him and made reports to

him; that plaintiff aided him in sales and they would go together and try to close up contracts together. The sales witness made whether personally or with plaintiff's efforts, were entered on the books to the credit of witness and that was true of the other salesmen.

On cross-examination witness said that when he made a sale he got credit on the books and if another salesman did the same he got credit for his sales and that at different times there must have been about 50 salesmen and that each one when he would make a sale would get credit for it on the books.

Thereupon, to further maintain the issues joined on his part, the plaintiff produced as a witness on his behalf ROY ROUSH, who gave evidence tending to show that he was bookkeeper and assistant to Mr. Kenney, the manager, during the time that plaintiff was employed by the defendant company and had charge of and access to the records of the office. Witness was thereupon shown cer-

29 tain papers representing tabulations of the billed sales of the defendant company for the State of Maryland, certain counties in Virginia and three counties in West Virginia according to request of the plaintiff to produce the amount of sales in territory that the plaintiff was connected with, and said tabulations were taken from defendant's sales book showing the exact amount of billed business during the period plaintiff was so employed. Witness thereupon stated that the total billed sales for the month of April, 1909, amounted to \$4,402.28; for May, \$3,540.07; June \$7,770.91; July \$5,849.97; August \$1,849.46; September, \$3,534.13; October \$7,263.36; November \$5,334.21; December \$2,675.13; January, 1910, \$2,092.73; February, \$2,325.61; that the total of said billed sales during the period just mentioned amounted to \$46,637.86. That said last mentioned amount represented according to witness's information from the files of the company, the gross amount of sales made in the territory covered by Mr. Thyson; that said sales were closed on the books and the shipments made covered all the paints that were sold and miscellaneous items also, including contracts—in other words, everything in the roofing department; said amounts were taken from the sales sheets which were produced in court, showing the total billed business of the company, the only form of sales sheet which the company had.

On cross-examination witness was shown certain deductions on his memorandum and asked to explain them. Thereupon witness stated that it frequently happened that the company was

30 compelled to issue a credit to a customer on a particular sale which might be overcharged and that credit reduced the original sale price, and when subtracted from the gross billed sale would make the actual amount of the sale.

That if a contract is made and a car-load of material consigned the entire price of the car-load was charged up or credited on that month's sales, and that if there is a re-sale of certain portions of the car-load in the territory to which the car is consigned that is also credited as sales of so much material. That in the memorandum

of sales referred to by the witness and hereinabove set out were included six consignment cars of roofing which were charged up and credited as a sale to the salesman originally.

"Q. Now, if the material is taken out of that car, consigned car, and distributed to certain customers in that territory, is that credited again as a sale? A. Yes, sir.

Q. And then it is charged off against the original amount of the sale, so as to make the sales balance, is that correct? A. Yes, sir.

Q. Now, have you the credits of that kind in this memorandum? A. Yes, sir, the total credits——

Mr. McNEILL: I object to that, your Honor. I want the privilege of bringing out at this point that these were orders absolutely accepted that he calls assignments.

31 The COURT: Well, let Mr. Frailey finish.

Mr. McNEILL: Your Honor will note the objection.

Q. The difference between the credits, as it appears on the memorandum, and the credit of the total sales for the month, represent the actual real sales made by the salesman? A. Yes, sir.

Q. Now, I will ask you to state what those credits are, just the total amount. A. The total amount?

Mr. McNEILL: This is all under my objection that your Honor has noted?

The COURT: I haven't noted any yet, because I thought you would take an exception to that later, Mr. McNeill, and I thought we had better get all these facts in and then we can tell the jury whether they should consider them in fixing the amount or not. I will note it later if I do not rule as you think I should on the subject. A. \$4,388.59.

Q. That leaves a balance of \$42,249.27, does it not? A. Yes, sir.

Q. Now, there is another credit here less the proportions of consigned cars remaining unsold. That has to come off, does it not, because they were not sold at all?

Mr. McNEILL: I object.

The COURT: Well, on their theory that would be so. If Mr. McNeill is right, they are bound by the first statement.

32 (Continuing:) Is that correct? A. Yes, sir.

Q. Now, how much do those cars remaining unsold amount to? A. The cars remaining unsold February 20th, 1910, the time of this period, is \$4,937.25.

Q. Now, taking those total deductions, what is the net amount that you have as the absolute sales of the office during the period involved here? A. \$37,312.02.

Mr. FRAILEY: That is all I care to ask this witness, if your Honor please, by way of cross examination."

On redirect examination witness stated there was a record in his office showing the charges against purchasers of consigned goods; that he had not the orders for any particular shipment with him;

that in the case of the six consignments making six car-loads, definite orders for those goods were signed by the purchaser with conditions attached. That each order for these six car-loads was in the usual form, but witness could not recall just what was inserted in the order. The only thing witness could say was that when they came to collect the account the people refused to pay because they claimed that Mr. Thyson—that the orders were on the usual order form but witness did not know what was inserted and could not say that anything was inserted; that the orders for the six car-loads mentioned were entered on the sales book as consignment sales; they were charged up to the customer because they had to have some

33 way of charging the customer to whom the car was consigned and they did not have any separate account. They put it all in the same sales book and for that reason that all appeared together there. That they did not charge it up to the customer as he paid for it because he did not pay for it, but there is nothing on the ledger to show that the sale was a consignment and not a sale. That he did not know whether there was anything on the order to show it.

Plaintiff was then recalled and gave evidence tending to show that he sold certain bills which the witness Roush had testified were consignment and that they were bona fide sales made on the regular order stating the shipping instructions, the amount of the order, the name of the consignee and the terms of the sale, and that there was no difference in the form of those orders from other orders except as to the terms of payment and that he was not authorized to direct shipments of goods that were not sold and that it was not the custom of the office to consign goods to anybody as a selling agent and leave goods with people that were not ordered and bought simply to be sold and returned, and that he did not know anything of these credits until produced in court. The orders were sent to the home office and approved there and after approval "we accepted them as sales and took credit for it."

On cross-examination, being asked whether the sales of consigned cars were made with the understanding between plaintiff on behalf of the company and the consignee that the company was to get credit for the goods not sold and that salesmen of the company

34 were to go out and get credit for the goods not sold witness stated that it was a bona fide sale and they had salesmen going through the territory and if they could help them in any way that they would do it, but were not obliged to do it.

Q. Did you make that arrangement with them? A. Not at all times.

Q. Did you on any occasion? A. Perhaps I did with one or two.

Plaintiff could not tell which one. He could not point out any of those that he had made that arrangement with because it was generally understood that our men would help out. But there was nothing specific in the order of sale to show that and that it was not

understood that if any of the goods were not sold the company was to get credit for those goods not sold.

Thereupon the plaintiff produced as a witness L. J. BURLEIGH, who gave evidence tending to show that no sales made by him were consignment sales, that they were not all made in the usual manner on order sheets; they were verbal orders and acceptances. Witness always gave customers a price and generally in writing and took contracts and orders.

On cross-examination witness stated he had never sold a consignment car.

Whereupon plaintiff rested.

Thereupon the defendant, to maintain the issues on its part joined, produced as a witness NATHAN SMITH KENNEY, who gave evidence tending to show that he is now employed as a special representative of the defendant and lives in Baltimore and in
35 April, 1909, was manager of the defendant's Baltimore office; that he knows the plaintiff and that the conversation he had with plaintiff with reference to plaintiff's employment was to the effect "that we were to pay Mr. Thyson \$125 per month salary, and that if at the end of 12 months, or an average thereof that his business—his volume of business at 5% would be more than the salary that we would increase his salary accordingly." That the plaintiff was employed at that time on a strict salary as a salesman and when first employed was not in charge of the roofing department of the company and was put in charge of that department possibly about three or four months afterward; that there was no arrangement with reference to his salary at that time and that the company decided to give him an increase. That witness had no authority with reference to the employment of salesmen but would get authority to employ salesmen from the home office in Cincinnati, which was in charge of the Vice-President and General Manager of the company, Mr. R. B. Crabbs. That witness had no authority at all to employ any salesman or employee other than as instructed by the home office and that nobody in the Baltimore office during the entire time the plaintiff was there had any such authority and that plaintiff did not employ any salesmen there except by application to the home office; that the application, being a part of Exhibit Thyson No. 2 was submitted to the plaintiff before it was sent to the home office for approval.

Q. What do you mean by accepted, please? A. Satisfied
36 with the arrangement, otherwise he would not have continued with us."

That plaintiff made no objection whatever to said application. That in said conversation with plaintiff, witness explained what was meant by the 5%. At this plaintiff's counsel objected and stated:

Mr. McNEILL: Our theory is that he (witness) was bound by the action of his home office and had no authority to do anything con-

trary to that, and that letter speaks for itself. (Meaning Exhibit Thyson No. 1.)

Thereupon witness resumed and stated that he told plaintiff that it was a fixed rule of the company that they started salesmen out at a certain salary, whether it was \$65, \$75 or \$125 per month, and that if during the year's service that he was with the company the volume of his business figured at 5% of the gross sales, was in excess of what he was being paid, then the branch under which he was working would recommend an increase equal to 5% of the volume of business and that the increase would be in his salary, there was no commission about it.

Q. What, if anything, did you say to him (plaintiff) about paying him 5% in addition to the \$125 per month, 5% upon the gross sales of the office? A. Nothing whatever, sir.

That there was no salesman in the employ of the company at the time witness was there employed, on a commission basis. That in the conversation referred to concerning plaintiff's employment witness said nothing whatever to plaintiff about a 5% basis, based
37 on the gross sales of the entire office.

Q. What was the volume of business, on what were the sales upon which any increase might be based—was it individual business of Mr. Thyson's as salesman, or was it the office business? A. It was individual business at that time.

That after plaintiff was in charge of the roofing department his individual sales were merged in the office sales. Witness denied that he had any conversation with plaintiff about commissions and that he had said to plaintiff, "Let's have this commission business out," and that plaintiff said, "What is it," and witness said, "I don't think Crabbs understands it," and plaintiff said, "I believe he does. He ought to at least. The correspondence will show it," and witness said, "Just let this go for a while."—that no such conversation took place and that there was nothing ever mentioned about commissions between plaintiff and witness and that in the conversation with reference to the employment of plaintiff which occurred between witness and plaintiff that witness did not tell him that he would give him \$125 a month or \$1,500 a year, which represented \$30,000 on about what they had been doing, and all over \$30,000 in his department he was to get 5% on. That with reference to the letter of Mr. Crabbs, being Exhibit Thyson No. 1, witness told Thyson about that part of the letter referring to an effort to secure the services of Thyson at \$125 a month, "with the understanding that we are to
38 pay him in salary the equivalent of 5% on his sales, \$125 a month simply representing a drawing account." With reference to the drawing account witness explained to plaintiff that it was a drawing account, to all salesmen in the shape of the salary; he gets it every month; that the explanation so given referred to that part of the letter stating "We have established a policy of paying all our salesmen, in so far as possible, according to their results based upon 5% of their gross sales. This is simply a figure used in figuring out what they are actually worth to us. Suggest you put this proposition up to Mr. Thyson and see what he thinks about it." With

reference to the increase of plaintiff's salary witness told him the company had decided to give him a little raise which would help him along or something to that effect.

Q. Now, had you any authority or power to increase Mr. Thyson's salary, except on the approval of Mr. Crabbs in Cincinnati? A. None whatever, sir.

Mr. McNEILL: We don't contend that he did have.

Mr. FRAILEY: All right, then, I won't go any further into that.

With reference to being put in charge of the roofing department plaintiff came to witness and wanted a stamp to use as a signature as manager of the department, and witness told him it was all right, that the company had no objection, and especially in view of the fact that he had put on a number of salesmen. That at that time
39 nothing at all was mentioned about his salary or compensation. That when new salesmen were employed and the plaintiff was present it was explained to such salesmen in plaintiff's presence that there was to be a salary gauged upon the 5% basis as described by the witness.

On cross-examination, witness stated that he could not have employed plaintiff except by authority of the home office and that the authority was the signature to the application. That the letter Exhibit Thyson No. 1 would not be official. That plaintiff was not employed until the application was duly signed. That no man is an employee of the company until the official application is signed by the officer of the company. That the authority under which witness employed Thyson was the letter of March 27, 1909 and of March 30, 1909, in which witness says, "I note yours of the 27th regarding position of F. W. Thyson. I have decided to follow out your approval of Mr. Thyson at \$125 per month, pay to start first of April, giving him the entire state of Maryland as his territory." That witness had no authority to employ plaintiff except on the application. Anything that plaintiff earned while he was a salesman was figured to his credit.

Q. What work was he to get credit for in computing the amount of business done in his territory? A. Why, if he manipulate the department under his management so there would be a profit made in that department, then the company would compensate him accordingly, or in the way they saw fit.

40 Q. You said a while ago that they could compensate him at the rate of five per cent on all the business done under his supervision at the end of the year. A. No, sir.

Q. What did you say? A. I said that they would compensate—that they would increase his salary to an amount equal to five per cent of his individual sales when he was a salesman.

The only contract we had with Thyson is the application. The contract was the application approved for position as salesman.

Thereupon defendant rested.

The foregoing is the substance of all the evidence in the case.

Thereupon the defendant requested the court to instruct the jury as follows:

"The jury are instructed to render a verdict for the defendant."

But the court refused to so instruct the jury, to which ruling of the court, refusing to so instruct the jury, the defendant then and there duly excepted.

Thereupon defendant requested the court to instruct the jury as follows:

"If the jury believe from the evidence that the plaintiff was employed on the 1st day of April, 1909, by defendant as a salesman in the roofing department of the defendant at an agreed salary
41 of \$125.00 per month, and that such salary was to be gauged upon the basis of five per centum of the individual sales of the plaintiff; that thereafter, on or about the 1st day of May, 1909, the *defendant* (plaintiff) was made manager of said roofing department of the defendant and as such received an agreed salary of \$125.00 per month, which salary was increased by agreement between plaintiff and defendant to \$150.00 per month on or about the 1st day of September, 1909, and remained at said sum per month until the plaintiff left the employ of the defendant on or about the 20th day of February, 1910, and that the plaintiff received said salary up to said last mentioned date, then their verdict should be for the defendant."

But the Court refused to so instruct the jury, to which ruling of the court, refusing to so instruct the jury, the defendant then and there duly excepted.

Thereupon defendant requested the court to instruct the jury as follows:

"If the jury believe from the evidence that the witness N. S. Kenney, while acting as manager of defendant's office in the City of Baltimore, State of Maryland, employed the plaintiff upon the terms that the plaintiff was to receive *his* compensation for his employment and services a fixed salary of \$125.00 a month and in addition thereto five per centum of the amount of all sales of roofing material made by defendant in the territory of Maryland and
42 certain parts of Virginia and West Virginia in excess of thirty thousand dollars, and if they further believe from the evidence that the said Kenney at the time of the employment of the plaintiff as aforesaid had no authority to employ plaintiff upon the terms aforesaid but had authority only to employ plaintiff in accordance with and upon the terms contained in the letters in evidence marked Exhibits "Thyson No. 1" and "Thyson No. 5," and the "application" in evidence, then they are instructed that the said employment of the plaintiff by the said Kenney upon the said terms of \$125.00 a month and five per centum of the amount of all sales of roofing material made by defendant in Maryland and parts of Virginia and West Virginia in excess of thirty thousand dollars did not bind the defendant, and their verdict should be for the defendant."

But the court refused to so instruct the jury, to which ruling of the court, refusing to so instruct the jury, the defendant then and there duly excepted.

Thereupon defendant requested the court to instruct the jury as follows:

"The jury are instructed that they are not to consider in this case the second count of the declaration and the plaintiff cannot recover thereon."

But the court refused to so instruct the jury, to which ruling of the court, refusing to so instruct the jury, the defendant then
43 and there duly excepted.

Thereupon defendant requested the court to instruct the jury as follows:

"If the jury find for the plaintiff, their verdict should be for an amount equal to 5 per centum of the difference between \$30,000 and \$37,312.02, that is 5 per centum of \$7,312.02."

But the court refused to so instruct the jury, to which ruling of the court, refusing to so instruct the jury, the defendant then and there duly excepted.

Thereupon the court charged the jury as follows:

"The COURT: Gentlemen of the jury, counsel for both sides have referred to these letters that passed between Mr. Kenney and Mr. Crabbs as showing what authority Mr. Kenney had to employ this man, the plaintiff, and what authority the plaintiff knew Mr. Kenney possessed, and to save you the trouble of taking them with you I will just read those through now and you can keep them in mind and consider them in passing upon this question. (Reading:)

BALTIMORE, MD., *March* 23, 1909.

Mr. R. B. Crabbs, V. P. The Philip Carey Co., Lockland, O.

DEAR SIR: In looking over the record of Mr. H. Z. Meginnis, I find that his efforts have availed about the same kind of results as all
44 previous salesmen we have had in the territory. I am thinking very strongly of dispensing with his services on the first of the month and I am able at the present time to secure one of the best men for our business that I have been able to meet so far.

While he is a high price man, yet I believe I can get him at much less salary than he is getting at the present time, because he is rather anxious to come with us, thinking that his ability as a salesman will secure for him a better future. He has about reached his limit in the business in which he is now associated and is willing to take a trial with us. I believe, however, I cannot get him for less than \$125 per month. By dispensing with Mr. Meginnis' services, this will make an increase in my expenses of \$60.00 per month if I should take him with us. He is thoroughly acquainted with all the architects and builders in the city and it is my intention to let him work in conjunction with these individuals and also get after the f. o. b. business in the State of Maryland.

The Virginia situation is now thoroughly covered by Mr. Hugins and in order to perfect my intentions for the f. o. b. business in the entire territory, it will be necessary for me to have a good man for the State of Maryland. Therefore, I would ask that you give me

your approval to secure the services of the man referred to. His name is Frank W. Tyson, thirty years old, married, living in Baltimore. I have been personally acquainted with him for a number of years and perfectly aware of his ability. I am fully satisfied we can increase our business very greatly provided there is any prospective business in sight.

Please let me hear from you along these lines as quickly as possible because warm weather is near and we want to get going at once. It is important that you give this matter your immediate attention.

If you so approve, I will forward application blank as per our usual custom.

Very truly yours,

N. S. KENNEY."

In reply to that, March 27th, 1909: (Reading:)

CINCINNATI, OHIO, *March 27th*, 1909.

Mr. N. S. Kenney, Mgr. The Philip Carey Company, Baltimore, Md.

DEAR SIR: Your favor of the 23rd received with reference to dispensing with Mr. H. Z. Meginnis' services, and any action you take in this matter will be entirely satisfactory to us, as Mr. Meginnis' showing so far is not satisfactory.

With reference to putting F. W. Tyson on the roll at \$125.00 per month, this is quite an increase in your selling expense when you take into consideration the fact that you have put Mr. Huggins on the roll at a good salary, and while we would like very much to have you secure the services of Mr. Tyson in view of the opinion you hold of him, we would suggest that you make an effort to secure his services for \$125.00 per month, with the understanding that we are to pay him in salary the equivalent of 5% on his sales, the \$125.00 per month simply representing a drawing account.

We have established a policy of paying all our salesmen in so far as possible according to their results based upon 5% of their gross sales. This is simply a figure used in figuring out what they are actually worth to us. Suggest you put this proposition up to Mr. Tyson and see what he thinks about it. If you can make connection with him you are at liberty to do so, and would thank you to let us know as to what date his services would start. Also send application in the regular way, and let us know on what date Mr. Meginnis' services will be terminated.

Very respectfully,

A. B. CRABBS,
Vice-President."

This is the application (reading):

"The Philip Carey Company.

*Application for Employment of Help.*BALTIMORE BRANCH, *March 30th, 1909.*

Position to be filled, Salesman.

Salary proposed, \$125.00 per month.

If position now occupied, by whom and what salary, No.

Name of applicant, Frank W. Thyson.

Age, 30 years.

47 Married or single, Married.

Nationality, American.

Religion, —.

Extent of education, High School and Eng. School.

3 Last previous employment, and its length, Maryland, Terra Cotta, y'rs.

Employments prior to last, and length of each:

Perth Amboy Terra Cotta Co., 5 y'rs.

Maryland Terra Cotta Co., 3 y'rs.

References, N. S. Kenney.

Remarks, —.

(Signed)

N. S. KENNEY.

Approved:

R. B. C.,

Vice-President."

Mr. McNEILL: Will your Honor read the letter attached to that application?

The COURT: Yes. That is addressed to Mr. Crabbs from Mr. Kenney. It is dated March 30th, 1909, Baltimore, Md.

"Mr. R. B. Crabbs, V. P., The Philip Carey Co., Lockland, O.

DEAR SIR: I note yours of the 27th regarding position of F. W. Thyson. I have decided to follow out your approval of Mr. Thyson at \$125.00 per month, pay to start first of April, giving him the entire State of Maryland as his territory.

48 I will dispense with Mr. Meginnis' services on Saturday of this week. He will be back from one of his trips at that time.

I enclose herewith application in regular way for Mr. Thyson.

Very truly yours,

N. S. KENNEY."

This application blank is not signed by Mr. Thyson. Mr. Kenney says that he saw it and accepted it and consented to it, but that he had this correspondence and knew what this correspondence was. Now, in view of that correspondence, are you to treat that application blank as containing the whole contract? He says you may offer him these terms and send us the usual application blank in the regular way, and then Mr. Kenney says I do, I enclose it, and that

says nothing about anything except \$125. Now, can you infer from those papers and what the papers themselves say that the application blank contained all there was of it—that there was to be nothing but \$125? Or can you read that in connection with the letters? I think you will have to take those papers together and construe them together. Now, what did that mean? Mr. Kenney said “I think I can get him for \$125, but will have to pay that.” Crabbs says “See if you can’t get him on this basis. \$125 as a drawing account and a salary based on 5% of the sales.”

Mr. FRAILEY: Of his sales.

The COURT: Yes, his sales. Now, what does that mean?
 49 Was he thinking that if he did not sell enough to amount to \$125 he would be saving something? If he could get him for \$125 a month was he anxious to propose that he should get more than \$125 a month? Why was he insisting on having him understand that he was to get a salary based on five per cent of his earnings of the gross sales, if it was to be more than what he was willing to work for? Now was it to apply both ways? If he made sales that would entitle him to more and if less would get less—that the salary would be fixed on that basis?

Now, has the plaintiff made out then by a fair preponderance of testimony, when you consider these papers, that he was to have a salary on the basis of five per cent of the sales, and that \$125 a month was a drawing account only? Now, if so, was that changed afterwards? If that was the fair contract that was entered into at the time, was it changed afterwards so that he was not to receive on the basis of the sales that he made, but was to receive only \$125 and whatever the company might see fit to pay him? Because it seems that soon after he began to work he did not make sales personally to any great extent. So I understand the evidence that most of the sales were made by these other salesmen working under him, and if he received only on the basis of his individual sales he would not be getting even \$125 a month, as I understand the evidence; but that is all for you. Well, what was the basis? Was it understood and is it a fair result of the way the business was treated by the

50 plaintiff and the company that what was sold in that territory was to be treated as his sales, whether he made it personally or whether he made the sale by helping the agent, or whether the sale was made by the agent under him, or was this contract abandoned and that he was to take whatever the company chose to give him? What was the situation?

Now, his position is that while he was not making the sales individually, he was increasing the business through these men who were working under him, and that these were all treated as his sales within the meaning of that contract. That he was credited with them on the books of the company. That is the way the accounts were kept and the way he expected that his salary was to be determined.

Now, has he made out by a fair balance of the testimony in the circumstances that that was the understanding between him and the company while he was at work there? If he fails, of course there

should be a verdict for the defendant. The burden is upon the plaintiff to make out all through by a fair balance of the testimony enough to recover.

Now there is a conflict in the evidence here as to whether he did insist that he was entitled to this addition to his \$125 or \$150, or whether he did not. What is the truth about it? The fact that he took the \$125 or \$150 and gave a receipt for it does not cut him off, as a matter of law. That is all for you to consider, whether that was simply received as his drawing account, or whether it was received in

51 full. If you think it was not received in full, that that was not the understanding, but was only his drawing account, well then he would not be cut off from recovering the rest merely by receiving that and receipting for it.

Now, if you are satisfied from the evidence in the case that the contract was that he was to receive a salary on the basis of 5 per cent of the sales, and if those sales, whether made by himself or his agents under him, were all to be treated as his sales, and that that contract was fairly within the authority conferred by these letters, and was the real understanding between the plaintiff and defendant company, then the question is how much he is entitled to, and there two views are presented: One is that he would be entitled to only the increase in proportion to a sale of some \$7,000 worth over the \$30,000, the other that he would be entitled to a salary on the basis of an increase of some \$14,000.

Mr. McNEILL: \$16,000.

The COURT: Sixteen thousand, rather, and that depends on whether you find on the evidence that the sales he made were out and out sales, or whether they were sales with the privilege of return consignments. Now he says he did not make any such sales. Mr. Rousch, is it, testified that some of them were returned. He does not know what the sale was—what the contract was; does not pretend to have any first-hand knowledge of it at all, and the testimony was given that the president of the company accused Mr. Thyson with having sold in this way, with a string attached to the sale, and

52 he denied it. As I said, that is to go out, because that does not constitute any admission. The statement of the president to him is not any evidence that that is a fact.

Now, on the evidence in the case, then, has the plaintiff made out by a fair balance that the amount in excess of the \$30,000 was this \$16,000? If he has why then his salary apparently would have to be computed on that basis, five per cent on that basis, assuming the plaintiff has made out the other part of his case, as I say. Now you have that amount, have you, Mr. McNeill?

Mr. McNEILL: Yes, your Honor, the jury has it.

The COURT: How much is it?

Mr. McNEILL: \$909 with interest.

The COURT: You have given that to the jury, have you?

Mr. McNEILL: Yes, that includes the interest.

The COURT: Oh, you should not include the interest; that is for the jury.

Mr. McNEILL: Your Honor asked me to include it.

The COURT: I did not mean the interest.

Mr. McNEILL: It is separate, your Honor.

The COURT: Well, if it is separate it should not trouble the jury.

Mr. FRAILEY: I gave mine, but I have lost my memorandum now. It is \$365.60.

The COURT: \$365.60?

Mr. McNEILL: Yes, exclusive of interest. Without the interest, your Honor, it was \$831.88.

53 The COURT: Now, as to interest, if you find for the plaintiff you have a right to allow interest at 6 per cent, if you see fit to do so, from the time when you find that the payment ought to have been made. I understand that the demand was made.

Mr. McNEILL: May 6th, 1910.

The COURT: May 6th, 1910, it would be proper for you, if you find for the plaintiff to add interest from that date. That is in your discretion. You can do it or not as you see fit.

If, when you report your verdict, if it is for the plaintiff, you should state whether you allowed interest or not. You can say in your verdict so much with interest from May 6th at 6 per cent, or you can compute the interest and put it in. That will make your verdict clear on that subject. If you think the plaintiff has failed to make out his case, why then simply find a verdict for the defendant."

Thereupon, the defendant excepted to so much of the charge of the court which is in the words and figures following, to wit:

"Now, if you are satisfied from the evidence in the case that the contract was that he was to receive a salary on the basis of 5 per cent of the sales, and if those sales, whether made by himself or his agents under him, were all to be treated as his sales, and that that contract was fairly within the authority conferred by these letters, and was the real understanding between the plaintiff and defendant company, then the question is how much he is entitled to * * *"

54 Thereupon the defendant renewed its exceptions severally to each of the said instructions prayed for and refused by the court.

Each of the foregoing exceptions growing out of the proceedings in this case was taken by the defendant at the time it appears to have been taken in the foregoing statement of the evidence and proceedings in the case and was at the same time and while the jury were still at the bar of the court and before they had retired to consider their verdict, entered upon the minutes of the presiding Justice; and the defendant prays the court to sign this its bill of exceptions, and it is done accordingly this 3d day of February 1911, now for then.

WENDELL P. STAFFORD,
Justice.

Designation of Papers for Record on Appeal.

Filed February 8, 1912.

* * * * *

The Clerk will please include the following papers in making up the record in this cause:

1. Declaration.
2. Plaintiff's bill of particulars.
3. Pleas.
4. Joinder of issue.
5. Amended declaration and bill of particulars.
- 55 6. Pleas to amended declaration.
7. Verdict for plaintiff for \$831.88 and interest from May 6, 1910.
8. Judgment on verdict.
9. Notation of appeal and order fixing supersedeas bond \$1,000 or cost bond \$100.
10. Assignment of errors.
11. Memo. of filing of supersedeas bond \$1,000.
12. Memo. of submitting of bill of exceptions.
13. Order extending time to file transcript in Court of Appeals to and including March 1, 1912.
14. Bill of exceptions signed and filed.
15. This designation.

CHARLES L. FRAILEY,
Attorney for Defendant-Appellant.

56 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 55, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52636 at Law, wherein William F. Thyson is Plaintiff and The Philip Carey Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of March, 1912.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2405. The Philip Carey Co., a Corporation, appellant, vs. William F. Thyson. Court of Appeals, District of Columbia. Filed Mar. 13, 1912. Henry W. Hodges, clerk.

